# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| Argument | 5 |
| Conclusion | 16 |
| Appendix | 17 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Humphrey's Executor* v. *United States*, 295 U. S. 602 | 7, 9, 10, 11, 13 |
| *Myers* v. *United States*, 272 U. S. 52 | 6, 7, 10, 11 |
| *Parsons* v. *United States*, 167 U. S. 324 | 6 |
| *Shurtleff* v. *United States*, 189 U. S. 311 | 6, 12 |
| Statutes: | |
| Tennessee Valley Authority Act of 1933, c. 32, 48 Stat. 58 | 2, 17 |
| Tennessee Valley Authority Act of 1933, 48 Stat. 58, as amended by Act of August 31, 1935, c. 836, 49 Stat. 1075: | |
| Sec. 2 | 6, 17, 18 |
| Sec. 3 | 19 |
| Sec. 4 | 6, 8, 9, 20 |
| Sec. 5 | 22 |
| Sec. 6 | 6, 7, 8, 24 |
| Sec. 7 | 25 |
| Sec. 9 (a) | 26 |
| Sec. 13 | 29 |
| Sec. 14 | 30 |
| Sec. 16 | 32 |
| Sec. 17 | 3, 32 |
| Sec. 22 | 34 |
| Sec. 23 | 35 |
| Sec. 24 | 35 |
| Budget and Accounting Act, 1921, c 18, 42 Stat. 20 | 10 |
| Federal Trade Commission Act, c. 311, 38 Stat. 717 | 7 |
| Act of May 27, 1908, c. 205, 35 Stat. 403, 406 | 12 |
| Act of July 15, 1913, c. 6, 38 Stat. 103, 108 | 12 |

Statutes—continued

| | Page |
|---|---|
| Act of September 7, 1916, c. 451, 39 Stat. 728, 729 | 12 |
| Act of September 8, 1916, c. 463, 39 Stat. 756, 795 | 12 |
| Act of February 28, 1920, c. 91, 41 Stat. 456, 470 | 13 |
| Act of June 3, 1922, c. 205, 42 Stat. 620 | 13 |
| Act of March 4, 1923, c. 248, 42 Stat. 1446 | 13 |
| Act of June 2, 1924, c. 234, 43 Stat. 253, 337 | 13 |
| Act of February 26, 1926, c. 26, 44 Stat. 9, 106 | 13 |
| Act of May 20, 1926, c. 347, 44 Stat. 577, 579 | 13 |
| Act of June 21, 1934, c. 691, 48 Stat. 1185, 1194 | 13 |
| Miscellaneous: | |
| S. Doc. 155, 75th Cong., 3d Sess | 3 |
| Committee Print, 75th Cong., 3d Sess., "Constitutionality of the General Accounting Office" | 11 |
| 59 Cong. Rec. 8609 | 11 |
| 84 Cong. Rec. 239 | 5 |

# In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 731

ARTHUR E. MORGAN, PETITIONER

*v.*

TENNESSEE VALLEY AUTHORITY, A CORPORATION, HARCOURT A. MORGAN, AND DAVID E. LILIENTHAL, AS MEMBERS OF THE BOARD OF DIRECTORS OF TENNESSEE VALLEY AUTHORITY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the District Court (R. 88) is reported in 28 F. Supp. at 732. The opinion of the Circuit Court of Appeals (R. 355) is reported in 115 F. (2d) at 990.

### JURISDICTION

The decree of the Circuit Court of Appeals was entered December 6, 1940 (R. 355). Petition for a writ of certiorari was filed January 31, 1941.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether the Tennessee Valley Authority Act prohibits the President from removing a director of the Authority for a cause other than violation of Section 6 of the Act.

2. Whether the Act, if construed to forbid removal for such other cause, is constitutional.

## STATUTE INVOLVED

The statute involved is the Tennessee Valley Authority Act of 1933 (c. 32, 48 Stat. 58). The Act, together with the amendments adopted by the Act of August 31, 1935 (c. 836, 49 Stat. 1075), is set out in full in the Appendix, *infra*, pp. 17–37.

## STATEMENT

Petitioner on July 6, 1938, filed a complaint in the Chancery Court of Knox County (R. 1), praying a declaratory judgment that he was a member and chairman of the Board of Directors of the Tennessee Valley Authority, notwithstanding his attempted removal from office by the President of the United States, and asking judgment for amounts due him as unpaid salary (R. 12–13, 82–83). The cause was removed to the District Court of the United States for the Eastern District of Tennessee (R. 79). A motion to dismiss the complaint (R. 86–88) was granted (R. 102). The Cir-

cuit Court of Appeals for the Sixth Circuit affirmed (R. 355).

The facts, as shown by the complaint (R. 2–13, 82–83), its exhibits (R. 14–69) and Sen. Doc. 155, 75th Cong., 3d Sess., included by stipulation of counsel (R. 84–85, 117), may be summarized as follows:

On May 22, 1933, the petitioner was duly nominated and appointed for a nine-year term as a member and chairman of the Board of Directors of the Tennessee Valley Authority, and, on May 30, 1933, his nomination and appointment were duly confirmed by the Senate, under Section 2 (a) of the Tennessee Valley Authority Act (R. 3–4).

A controversy arose among the three members of the Board of Directors of the Authority which became public when a series of public statements and charges were made by the petitioner, Arthur E. Morgan (R. 121–123). The President, pursuant to the powers vested in him by Article II of the Constitution of the United States, and specifically by Section 17 of the Tennessee Valley Authority Act,[1] requested the three members of the Board of

---

[1] Section 17 of the Tennessee Valley Authority Act provides that "* * * the President is hereby expressly authorized, without regard to the restriction or limitation of any other statute, to select attorneys and assistants for the purpose of making any investigation he may deem proper to ascertain whether, in the control and management of Dam Numbered 2, or any other dam or property owned by the Government in the Tennessee River Basin, or in the authorization of any improvement therein, there

Directors to appear before him for a hearing upon the serious charges that had been made of malfeasance and maladministration of the statute (R. 124). As a result of this request, the three directors appeared before the President on March 11, March 18, and March 21, 1938 (R. 140, 291, 338). At these hearings each of the directors was given full opportunity to present his version of the controversy and to explain and comment upon any and all the matters at issue (R. 151, 140–354). Throughout these proceedings the petitioner was repeatedly requested and urged by the President to explain the situation and to produce facts in support of the grave charges of misconduct and maladministration that he had publicly leveled at his two colleagues (R. 126). Despite the presentation of evidence by Directors Lilienthal and Harcourt A. Morgan to refute the charges made by the petitioner, he persistently refused to participate in the inquiry (R. 125–131), on the ground that the facts

---

has been any undue or unfair advantage given to private persons, partnerships, or corporations, by any officials or employees of the Government, or whether in any such matters the Government has been injured or unjustly deprived of any of its rights." The principal charges made by Dr. Morgan against his former colleagues were that the latter had given undue advantage to private persons in the handling of certain claims for the taking of marble in the Norris Dam Reservoir and the execution of contracts for the sale of power by the Authority to the Arkansas Power & Light Company and the Aluminum Company of America (R. 125, 151 *et seq.*; 186 *et seq.*; 204 *et seq.*).

could adequately be investigated only by a congressional investigating committee.

Finally, after three days of hearings, the President informed the petitioner that if he persisted in that attitude, it would be necessary to remove him from office for the reasons indicated by the record, and a final opportunity was afforded to him to participate in the inquiry and furnish facts in support of his charges (R. 334–337). When he failed to take advantage of this opportunity, the President notified him on March 22, 1938, that he was being removed as a member of the Board of Directors of the Tennessee Valley Authority, upon the ground, among others, that he had refused to participate in the investigation (R. 56–7). The President immediately dispatched a message to Congress informing that body of the removal, and explaining the circumstances that made such action necessary (R. 119–120).

Since the filing of this suit, the President has exercised the power of appointment conferred upon him by the statute and has appointed Mr. James P. Pope to the vacancy on the Board of Directors created by the removal of the petitioner. This appointment was duly confirmed by the Senate on January 12, 1939 (84 Cong. Rec. 239).

## ARGUMENT

The decision below, as petitioner points out (Pet. 10), proceeds upon two independent grounds:

first, that Sections 4 (f) and 6 of the Tennessee Valley Authority Act, relied on by petitioner, do not undertake to restrict the inherent and implied power of the President to remove the directors of the Authority; and, second, that the Authority exercises purely executive or administrative functions so that the limitations upon the presidential power of removal found in *Humphrey's Executor* v. *United States,* 295 U. S. 602, were inapplicable. Either ground, as the petitioner recognizes, is sufficient to support the removal. Each was correctly decided.

1. The Directors of the Authority are appointed by the President (Sec. 2 (a)), and it is well settled that the power to appoint includes the power to remove in the absence of statutory restriction. *Parsons* v. *United States,* 167 U. S. 324; *Shurtleff* v. *United States,* 189 U. S. 311; *Myers* v. *United States,* 272 U. S. 52, 119.

(a) Section 6 provides as follows:

> In the appointment of officials and the selection of employees for said Corporation, and in the promotion of any such employees or officials, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency. *Any member of said board who is found by the President of the United States to be guilty of a violation of this section shall be removed from office by the President of the United States,* and any ap-

> pointee of said board who is found by the board to be guilty of a violation of this section shall be removed from office by said board. [Italics added.]

Petitioner argues (Pet. 16) that this provision should be construed as excluding removals for all other causes. But this section does not purport to confer a power or a right upon the President or to impose any limitation on his inherent power of removal. (*Cf.* Brandeis, J., dissenting in ***Myers*** v. *United States,* 272 U. S. 52, 241, 250–252.) It imposes, instead, a mandatory duty to remove under the prescribed circumstances. There is no inconsistency in the existence of a general power of removal and a mandatory provision requiring removal for a specific cause.

Petitioner contends (Pet. 19) that the decision in *Humphrey's Executor* v. *United States,* 295 U. S. 602, compels a different construction. But there is a significant difference between Section 6 of the Tennessee Valley Authority Act and Section 1 of the Federal Trade Commission Act (c. 311, 38 Stat. 717). The latter statute provided:

> Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

The Court in the *Humphrey* case held that since this section by its terms purported to confer upon the President the power to remove for one of the enumerated causes, by necessary implication it pro-

hibited removal for any cause not included within the enumeration (295 U. S. at 623). If this language were construed as leaving the general executive power of removal unimpaired, so the Court concluded, the enumeration would be patent surplusage. The Tennessee Valley Authority Act, in contrast, contains no enumeration of causes for which the President *may* remove; it contains merely a mandate that he *must* exercise his power of removal in the one specified instance. That mandate may be given full effect without in any degree affecting the general power of removal.[2]

(b) Petitioner's principal reliance is placed upon the proviso of Section 4 (f). That section, after providing for the appointment of a treasurer and assistant treasurers by the Board of Directors, declares:

> * * * *Provided,* That any member of said board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives.

---

[2] The petitioner suggests (Pet. 16) that it is immaterial that the provisions of Section 6 are mandatory, stating that if the word "may" were substituted for "shall," the President would still have a clear duty to remove a director who had violated Section 6. That Congress thought it was imposing a duty rather than merely giving a power is shown by the fact that the same section in substantially identical language imposes a similar duty on the Board of Directors to remove any of its appointees who violate this section, despite the fact that under Section 3 of the Act the board is expressly given the power, in its discretion, to remove any of its appointees.

Petitioner asserts (Pet. 17–18) that this section sets up the exclusive method by which a member of the board may be removed from office. In order to reach this conclusion, it is necessary to read into the language of the proviso not only a limitation but a complete abrogation of the executive power of removal in favor of the two houses of Congress, one of which does not even participate in the act of appointment under the Constitution.

To adopt such a construction would extend the legislative power far beyond the bounds marked out in the *Humphrey* case, dealing with a *quasi*-judicial office. There all that was held was that a rather comprehensive enumeration of causes for removal should be construed as excluding removal for any other cause. Here petitioner contends that while Section 6 imposes upon the President the mandatory duty to remove for one specific cause, the provision in Section 4 (f) strips him of any discretionary power of removal.

The Congress has enacted no such extraordinary limitation upon the executive power of removal. Nothing in the proviso of Section 4 (f) declares that it shall be the only method of removal, and the reasonable construction of the language is that Congress intended simply to provide an alternative method of removal by the two houses of Congress in cases where the President had failed to exercise his discretionary power of removal. Thus the pro-

viso, correctly construed, merely supplements the more cumbersome process of impeachment.

It is significant that petitioner points to nothing in the long debates upon the Tennessee Valley Authority Act and the bills which preceded it as expressing any intent to destroy the executive power of removal. At the time this statute was passed, the *Myers* case had not yet received the limited qualification introduced by the *Humphrey* case, and it cannot be supposed that Congress would intend to fly so squarely in the teeth of the *Myers* decision without at least a clear expression of an intention to limit the presidential power of removal.

The contrast between the language of Section 4 (f) of the Tennessee Valley Authority Act and the language employed in the Budget and Accounting Act of 1921 (c. 18, 42 Stat. 20, 24) throws further light on the legislative intent. When Congress was deliberately attempting to place the office of the Comptroller General beyond the presidential power of removal, it used language that could not be subject to any other interpretation. That statute provides:

> The Comptroller General or the Assistant Comptroller General may be removed at any time by joint resolution of Congress after notice and hearing, when, in the judgment of Congress, the Comptroller General or Assistant Comptroller General has become permanently incapacitated or has been inefficient,

> or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and *for no other cause and in no other manner except by impeachment.* [Italics added.]

It is fair to assume that the omission of these significant words of limitation from the Tennessee Valley Authority Act was not accidental. The controversy concerning the constitutionality of the quoted provision of the Budget and Accounting Act had started with President Wilson's veto of the first bill [3] and had been revived by the subsequent decision of the Supreme Court in the *Myers* case. The Budget and Accounting Act was the only statute in existence at the time of the passage of the Tennessee Valley Authority Act attempting to provide for removal by a joint resolution of the two houses of Congress. It would seem that if Congress had intended to place the directors of the Authority in the same category with the Comptroller General, the clear and unambiguous language of the existing statute would have been followed. The only reasonable explanation is that the variation in language was deliberate.[4]

---

[3] 59 Cong. Rec. 8609. See also Committee Print, 75th Cong., 3d Sess., entitled "Constitutionality of the General Accounting Office."

[4] It might be suggested that several statutes containing an enumeration of grounds for removal similar to those of the Federal Trade Commission Act expressly declared that removal should be "for no other cause," and that this Court in the *Humphrey* case attributed no legal significance to the

(c) It thus appears that the decision below involved merely the application of an established principle of statutory construction to the particular problem presented by the Tennessee Valley Authority Act. No federal statute has been found with provisions for removal which are similar to those of the Tennessee Valley Authority Act. The question of statutory construction would establish a precedent applicable only to the three directors of the Tennessee Valley Authority and does not seem of importance sufficient to warrant review by this Court.

---

difference in language. It seems clear, however, that prior to the debates on the Budget and Accounting Act, the omission of the phrase "for no other cause" was of no particular legal significance. Following the decision in *Shurtleff* v. *United States*, 189 U. S. 311, Congress amended the statute there involved and expressly provided that general appraisers should be removed for enumerated causes "and no other." Act of May 27, 1908, c. 205, 35 Stat. 403, 406. The amendment was adopted with little debate and no consideration of the constitutional issues. The Act of July 15, 1913, c. 6, 38 Stat. 103, 108, provided that the Commissioner of Mediation and Conciliation should be removed "only for misconduct in office," a provision which apparently has never been copied in any other subsequent statute. The removal provision in the Federal Trade Commission Act was modeled after that in the Interstate Commerce Commission Act passed in 1887, long before the decision in the *Shurtleff* case, and was adopted without any express consideration of the legal significance of the provision. The removal provisions in the statutes creating the United States Shipping Board and the United States Tariff Commission (Act of September 7, 1916, c. 451, 39 Stat. 728, 729; Act of September 8, 1916, c. 463, 39 Stat. 756, 795) are iden-

2. The question whether the Congress may constitutionally limit or substantially abrogate the power of the President to remove the directors of the Tennessee Valley Authority, or similar agencies, is, of course, one of major importance. However, as we have shown, Congress did not attempt so to limit the power of the President, and the constitutional question is not presented in this case.

If this question should be presented, a consideration of the Tennessee Valley Authority Act as a whole demonstrates that the functions of the directors of the Tennessee Valley Authority are, as

---

tical with that in the Federal Trade Commission Act, and presumably followed the same model. In fact, prior to the debates on the Budget and Accounting Act, the legal issues involved in the statutory restriction of presidential removal had not been debated or considered by Congress in modern times. It is significant that from the time of these debates until the decision in the *Humphrey* case, every statute, so far as we have been able to ascertain, precisely enumerating the grounds of removal, contained the phrase "for no other cause." Act of February 28, 1920, c. 91, 41 Stat. 456, 470 (Railroad Labor Board); Act of March 4, 1923, c. 248, 42 Stat. 1446 (U. S. Coal Commission); Act of June 2, 1924, c. 234, 43 Stat. 253, 337 (Board of Tax Appeals); Act of February 26, 1926, c. 26, 44 Stat. 9, 106 (Board of Tax Appeals); Act of May 20, 1926, c. 347, 44 Stat. 577, 579 (Board of Mediation); Act of June 21, 1934, c. 691, 48 Stat. 1185, 1193 (National Mediation Board); *cf.* Act of June 3, 1922, c. 205, 42 Stat. 620 (Federal Reserve Board). In brief, ever since the debate on the Budget and Accounting Act, at which time the Congress carefully considered every legal question presented, the Congress has left no doubt as to its purpose whenever it intended to restrict the grounds of removal.

found by the court below (R. 361–362), predominantly executive and that the incidental duties vested in them which might be held to partake of a *quasi*-legislative or a *quasi*-judicial nature are minor in character and considerably less substantial than those attached to other offices which are concededly executive in nature.[5] The principal functions performed by the Tennessee Valley Authority are the construction of dams on the Tennessee River and its tributaries; the operation of the dams in the interest of navigation, flood control, and the national defense; the generation of electricity at the dams; the sale of electricity at wholesale by means of transmission facilities constructed by the Authority; the production and distribution of new forms of fertilizer in aid of agriculture; and the management of the Government property entrusted to the Authority. All other functions are by the terms of the statute itself subordinate and collateral in nature. Each of these major functions has traditionally been exercised only by the executive departments of the Government.

---

[5] The close relationship of the Chief Executive to the functions of this agency is worthy of note. In no less than 17 places in the statute the President is directly authorized either to take some specific action or to require such action by the directors (Secs. 2 (a), (b), (e); 4 (k); 5 (i), (n); 6; 7 (b); 9 (a), (b); 13; 14; 16; 17; 22; 23; 24).

The basic theory of petitioner's position seems to be that the directors of the Authority are the agents of Congress and that Congress has set up the agency to act as its representative in supervising the administration of this statute (Pet. 10–15, 20–23). But under our constitutional system the sole function of Congress is to legislate. It can not, either directly or through its agent, supervise or control the administration of a statute once adopted by it; when it legislates, its power is exhausted. The administration of its mandates is the province of the executive department.[6]

[6] In the event that the petition is granted, the Government will also contend that, assuming that Congress may regulate the grounds of removal of the directors of the Authority, or similar agencies, it may not, as petitioner contends it has sought to do, substantially abrogate the power of removal, particularly where, as in this case, the removal is related to the performance of functions expressly delegated to the President by statute.

295893—41——3

**CONCLUSION**

The court below correctly construed the removal provisions of the Tennessee Valley Authority Act, a question which is neither doubtful nor important, and accordingly the constitutional question is not reached. It is respectfully submitted that the petition should, therefore, be denied.

FRANCIS BIDDLE,
*Solicitor General.*
FRANCIS M. SHEA,
*Assistant Attorney General.*
WILLIAM C. FITTS, JR.
*General Counsel, Tennessee Valley Authority.*
ADRIAN S. FISHER,
*Attorney, Tennessee Valley Authority.*
OSCAR H. DAVIS,
*Attorney, Department of Justice.*

FEBRUARY 1941.